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No. 96-254

In The

Supreme Court of the United States

October Term, 1995,

JOAN FLYNN, ROBERT BERTERMANN, EVA CHRISTOPHERSON, SALLY GUZEK, PAUL ROSENQUIST, JAY WILDFONG, ED BOWMAN, SHIRLEY DANDENEAU, BONNIE FULLER, HELEN HESS, JOHN GRECO and JOSEPH PORCARO,

Petitioners,

v.

DENNIS KORNWOLF and STEPHEN SIMANEK, in their individual capacities, and RACINE COUNTY, a municipal corporation,

Respondents.

On Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

BRIEF OF RESPONDENT, STEPHEN SIMANEK, IN OPPOSITION TO GRANTING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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18 pp

QUESTION PRESENTED FOR REVIEW

The petitioners discern two questions presented for review. Judge Simanek discerns but one such question, and submits that it is this: If the Seventh Circuit erred in applying certain Federal case law in ruling that the court order here involved created no property interest of the petitioners triggering due process protections, does such error warrant remand of this case to the Seventh Circuit for a re-consideration of such ruling?

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 3

ARGUMENT 5

THE REASONS PRESENTED BY PETITIONERS FOR GRANTING THE WRIT OF CERTIORARI SOUGHT HEREIN ARE MERITLESS 5

CONCLUSION 14

TABLE OF AUTHORITIES

CASES CITED

Bantz v. Montgomery Estates, Inc.,
163 Wis. 2d 973,
473 N.W.2d 506 (Ct. App) 1991) 8

Ferraro v. Koelsch,
124 Wis. 2d 154,
368 N.W.2d 666 (1985) 8

Hewitt v. Helms,
459 U.S. 460, 471, 472,
103 S. Ct. 864,
74 L. Ed. 2d 675 (1983) 6

Larson v. City of Tomah,
193 Wis. 2d 225,
532 N.W.2d 726 (1995) 9

Sandin v. Conner,
115 S. Ct. 2293 (1995),
132 L. Ed. 2d 418 (1995) 6

State v. Cannon,
196 Wis. 534, 221 N.W. 603 (1928) 11

Vorwald v. School Dist. of River Falls
167 Wis. 2d 549, 482 N.W.2d 93 (1992),
cert. denied, 506 U.S. 941 (1992) 5-10

OTHER AUTHORITIES

60 C.J.S. Motions & Orders, § 1 10

Sup. Ct. R. 10 (United States Supreme
Court Rule) 4, 12, 13

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The respondent, Stephen Simanek, reflecting his judicial status as a Circuit Judge of the State of Wisconsin, will hereinafter be called "Judge Simanek;" and the Petition for Writ of Certiorari filed herein "The Petition." The United State Court of Appeals for the Seventh Circuit will hereinafter be called "Seventh Circuit."

STATEMENT OF THE CASE

Respondent Judge Simanek agrees with the statement of the case set down by petitioners except for the following objectionable features. Such features are:

(1) The presence at p. 3, The Petition, of the paragraph commencing, "[b]eginning on May of 1991," consisting entirely of matters dehors the record.

(2) The presence in The Petition of other matters dehors the record. They are: (a) the statement at p. 4 thereof that, "In the summer of 1992, Respondent, Racine County Executive Dennis Kornwolf, decided that the Petitioners should be laid off to prevent them from obtaining pension coverage for 1992;" (b) the statement at p. 5 thereof that, "Because of the resulting reduction in hours of available work, two court attendants were forced to retire;" (c) the statement at p. 5 thereof that, "He [Judge Simanek] also notified them that if they wished to apply to the Kelly Temporary Service, they would be assigned to the courthouse and would perform the same duties they had previously performed as county employees" (bracketed material supplied); and (d) the statements at p. 5 thereof that, "The cost to Racine County, per hour, to employ the part-time court attendants was $6.54 without pension, and $6.90 with pension. The cost to Racine County, per hour, to appoint Kelly Temporary Service employees to the same position was $7.20 per employee."

(3) The presence in The Petition, at p. 4, of the assertion that "Kornwolf undertook these layoffs despite the bailiffs having offered to work for less pay in order to keep their jobs (App. 37), and despite the Racine County Corporation Counsel having advised that the layoffs were illegal." Such assertions are objectionable because App. 37 does not show "the bailiffs having offered to work for less pay in order to keep their jobs," and because the record here involved is devoid of any showing that "the Racine

County Corporation Counsel . . . advised that the layoffs were illegal."

(4) The presence in The Petition of argumentative language, namely, the reference in the last paragraph of p. 4 thereof to "the court order specifying that the Petitioners were employed until January 31, 1993 . . . ." (Emphasis supplied.)

SUMMARY OF ARGUMENT

A.

Petitioners submit, as their first reason for granting the writ sought herein, that "Certiorari should be granted to make clear that the Seventh Circuit Court of Appeals' use of the 'explicitly mandatory language' standard to determine whether the petitioners had a property interest in their employment was error because state law provides the sole reference for determining such interests." The Petition, p. 9. Assuming, for purposes of argument only, that the Seventh Circuit erred in employing the "explicitly mandatory language" standard, derived from Federal case law, in determining that the petitioners had no property interest in their employment, it is then submitted that such error was innocuous, because under Wisconsin case law, not resorted to by the Seventh Circuit, petitioners clearly had no property interest in their employment. Consequently, no worthwhile legal interest would be served by a decision of this Court that the assumed error above-described was committed by the Seventh Circuit, since there is no good reason to presume that Federal courts in general will be prone to the commission of such error.

B.

Petitioners submit, as their second reason for granting the writ sought herein, that "Certiorari should be granted to make clear that the 'explicitly mandatory language' standard, which this court has never approved in the property interest context, and has recently rejected in the prisoners' rights context, should not be used by Federal courts to determine whether a property interest exists." The Petition, p. 16.

Pertinent, quoted parts of Rule 10 of the Rules of this Court show no compelling reason for granting the writ sought herein.

While Rule 10 does not cover all of the compelling reasons for granting a writ of certiorari, this case presents no compelling reason other than one of those described in Rule 10, for granting the writ. Again assuming, for purposes of argument only, that the Seventh Circuit erred in its application of the "explicitly mandatory language" standard, the innocuous nature of such application rules out the existence of any truly compelling reason for granting the writ sought herein. Had such application denied the petitioners a property right in their employment to which they were entitled, a compelling reason would arguably have existed for granting the writ; but no such denial occurred.

Petitioners apparently believe that the writ should issue herein for warning and instructional purposes; with petitioners apparently believing that an opinion issuing such writ and remanding this case to the Seventh Circuit for reconsideration of so much of its decision as involved application of the "explicitly mandatory language" standard would serve as a warning device and instructional tool for lower Federal courts. But the reason, if any, for issuance of the writ to serve such purposes falls far short of a truly compelling reason for issuance of the writ herein.

ARGUMENT

THE REASONS PRESENTED BY PETITIONERS FOR GRANTING THE WRIT OF CERTIORARI SOUGHT HEREIN ARE MERITLESS.

A.

Petitioners submit, as their first reason for granting the writ they seek, that "Certiorari should be granted to make clear that the Seventh Circuit Court of Appeals' use of the 'explicitly mandatory language' standard to determine whether the petitioners had a property interest in their employment was error because state law provides the sole reference for determining such interests." The Petition, p. 9.

In submitting such reason, petitioners first contend, and correctly, that "A. This Court has consistently held that state law is the sole reference by which property interests in employment are to be determined." The Petition, pp. 9, 10. They further contend, correctly, that "C. There is no requirement in Wisconsin law that language creating a property interest in employment must, in addition to specifying the duration of employment, contain 'explicitly mandatory language.'" The Petition, pp. 12, 13. They then assert, "D. The Seventh Circuit Court of Appeals refused to follow state law to determine whether the petitioners had a property interest in their employment." The Petition, p. 14. Such assertion is at least in some degree unfair to the Seventh Circuit, which, in ruling on the question of whether the court order here involved vested a property interest in their employment in the petitioners, specifically mentioned and quoted Vorwald v. School Dist. of River Falls (hereinafter "Vorwald"), 167 Wis. 2d 549, 482 N.W.2d 93 (1992), cert. denied, 506 U.S. 941 (1992), a case, as shown below, decisive on the above-described question. See App. 6. While the Seventh Circuit cannot be said to have ignored Vorwald, it chose, in

responding to petitioners' contention that the court order in question had "abrogated Wisconsin's general rule of at-will employment and made their employment terminable only for cause" to apply the "explicitly mandatory language" standard, stating that, "Absent such language, the mere fact that the plaintiffs allegedly relied on the order as guaranteeing their employment until the order expired was not sufficient to create a property interest that would trigger due process protections." App. 7. Such standard may have its provenance in Federal law, specifically in Hewitt v. Helms, 459 U.S. 460, 471, 472, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983); with such standard relating to the creation and existence of a "liberty interest" triggering due process protections, rather than a property interest. This Court has now abandoned the methodology of seeking a liberty interest in the language of state regulations. See Sandin v. Conner, 115 S. Ct. 2293, 2300 (1995), and n.5 therein, at p. 2300; 132 L. Ed. 2d 418, n.5 at 429. Nevertheless, it is clear that the Seventh Circuit did apply such standard in reaching its decision herein on the effect of the court order in question.

Even if the Seventh Circuit had no Supreme Court precedent for its use of the "mandatory language" predicate in this context, must certiorari be granted here to correct any error? The answer, it is submitted, is an emphatic "No," in view of the innocuous nature of such assumed error. Why innocuous? Because, it is submitted, it is amply clear under Wisconsin case law, namely, Vorwald, cited supra, that the court order in question, by its very nature, could not and did not vest in the petitioners a property interest in their employment. Vorwald leaves no doubt on that score, by its unequivocal holding that, "Absent civil service regulations or laws, or a contract or collective bargaining agreement, a municipal employee is an employee at will and has no property interest in employment." (Emphasis supplied; Vorwald, 167 Wis. 2d at 557.) And obviously, the court order here in question is not a civil service regulation, a civil service law, a contract, or a bargaining agreement. Petitioners, in a patent and

futile effort to avoid the unfavorable impact of Vorwald on their claim to possess a property interest in their employment, argue, with reference to the above-quoted Vorwald holding, that, "The context in which the court made this statement makes clear that the court did not intend to exclude court orders as potential sources of property interests. The court was merely identifying the more typical kinds of documents which create property rights in employment. The court made clear later in the opinion that a variety of documents could create property interests and cited as examples employee handbooks and personnel policies." (The Petition, p. 11.)

The argument falls short. Vorwald, in its portion immediately above-quoted, did neither of the two things described in the first two sentences of such argument, nor did the Vorwald court make clear "later in the opinion that a variety of documents could create property interests and cited as examples employee handbooks and personnel policies." What such court did do, "later in the opinion," in finding that "the school district's personnel policy No. 4210 did not alter Vorwald's employee-at-will status," was to then declare that, "In some limited circumstances, employee handbook and personnel policies can abrogate the employment-at-will relationship." (Emphasis supplied.) This statement, it is submitted, does not show Vorwald as holding that "a variety of documents could create property interests" nor does it show Vorwald as citing, as examples of such "variety," employe handbooks and personnel policies. Instead, the two portions of Vorwald above quoted, read in conjunction, show Vorwald as holding that a municipal employe is an employe-at-will, and has no property interest in his/her employment, unless such interest is created by civil service regulations or civil service laws, or a contract, or a collective bargaining agreement; or, in some limited circumstances only, by employe handbooks and personnel policies. Clearly, a Wisconsin municipal employe can acquire a property interest in his/her employment only by one of the above-

described modes, none of which is a court order, or anything akin thereto.

Vorwald is one of several Wisconsin cases standing for the proposition that handbooks or personnel procedures may abrogate employment at will. See also, Ferraro v. Koelsch, 124 Wis. 2d 154, 368 N.W.2d 666 (1985) and Bantz v. Montgomery Estates, Inc., 163 Wis. 2d 973, 473 N.W.2d 506 (Ct. App. 1991). However, the handbook or policy in question only does so by including a term that the employe may be dismissed only for "just cause," which thus creates the binding employment contract abrogating employment at will, and, in the case of a public employer, amounts to a source for the constitutionally protected property interest in continuing employment. When there is no language containing a "just cause" provision, or where there is additional language limiting such an interpretation of the handbook, then the Wisconsin courts have refused to find a contract that abrogates employment at will. See Vorwald, 167 Wis. 2d at 558 (school district's self-imposed policy relating to discharge did not limit its common law right to discharge employe at any time); Bantz, 163 Wis. 2d at 983 (handbook that only suggests, but does not mandate progressive discipline and does not state that discharge will be only for "just cause" does not abrogate employment at will). In contrast in Ferraro, 124 Wis. 2d at 159, the employe handbook stated, "[The employer] policy requires that employees not be dismissed or laid-off without just cause." There, the Wisconsin Supreme Court was persuaded that the "just cause" language created a contract that abrogated employment at will.

However the court order at issue here may be construed, it most clearly is not a document that provided that the bailiffs would be terminated only for "just cause." The lack of this term, as the Seventh Circuit recognized, pre-empted the bailiffs' argument that they had a property interest created by the court order. Nothing in the court order abrogated the bailiffs' status as "at will" employes.

Therefore, nothing in the court order gave the bailiffs a property interest under Wisconsin law.

The Petition, at p. 12, asserts that because the court order in question stated that petitioners' employment "was for a specified duration, under Wisconsin law, it gave the Petitioners a property interest in their employment." (Emphasis supplied.) In response to this, it must first be observed that the order in question (App. 43, 44) contains no express statement that petitioners' employment "was for a specified duration"; and it is highly arguable that such order, merely because it provides that it is "effective immediately this date, December 19, 1991, and shall expire January 31, 1993" (App. 44), must be read as implying employment of petitioners "for a specified duration." Even if, however, it be assumed, for purposes of this argument only, that the court order in question so implies, it is then submitted that Wisconsin law nowhere holds that any instrument, paper, or thing indicating a "specified duration" for the employment of a municipal employe vests a property right to such employment in such employe. Instead, as Vorwald so clearly shows, such right can only be vested in a municipal employe by one of the modes so precisely described therein, none of them a court order. Petitioners assert that, "Wisconsin law provides that a property interest in employment exists where the employment is for a specified duration." The Petition, p. 10. It thereby implies that any mode creating employment for a municipal employe, so long as such employment is for a definite duration, creates a property interest in such employment. In support of such assertion, The Petition quotes the statement in Larson v. City of Tomah, 193 Wis. 2d 225, 232-33 n. 7, 532 N.W.2d 726, 729 n. 7 (1995) that, "An employee-at-will is one who is hired for an indefinite period of time and who may be discharged without cause." This statement, it is submitted, goes no further than to define what an "employee-at-will" is, and to observe that he/she "may be discharged without cause." And it is manifestly not a statement or holding which overrides Vorwald, and enables a municipal employe to acquire a

property interest in his/her employment in some manner other than by one of the modes described in Vorwald.

In closing this argument, two other aspects of The Petition merit some mention. First is its portion reading:

> The creation of a property interest under Wisconsin employment law does not depend on the form of the document establishing the employment relationship but on whether the document states that the employment is for a specified duration. The opinion of the Seventh Circuit Court of Appeals was correct to the extent that it recognized that under Wisconsin law a court order could be the source of a property interest in employment.

The Petition, p. 11.

In response to this, it is first submitted that the creation of a property interest for a municipal employe in his/her employment can only come about in Wisconsin, as Vorwald shows, through one of the modes specified therein. In further response, it simply is not true that the Seventh Circuit, in its decision here involved, "recognized that under Wisconsin law a court order could be the source of a property interest in employment." See App. 6, 7.

The second aspect of The Petition meriting some mention is its attempt, at pp. 11, 12, to put the court order in question into the Vorwald category of "civil service ... laws" which provide one of the modes whereby a municipal employe in Wisconsin can acquire a property interest in his/her employment. Obviously, however, to equate the court order in question, or any court order, with civil service laws, is to take an untenable position. Court orders are not laws of any kind, but sui generis. It has been said of a court order that it is a "judicial act" (see 60 C.J.S. Motions & Orders, § 1, p. 5); but the order in question is

arguably an administrative act. Judicial or administrative, it is plainly not a civil service law, or any kind of law, produced by legislative action, in which a court may not engage.

Here, it should perhaps be observed that in seeking to equate the court order in question with civil service laws, petitioners erroneously assert that, "under Wisconsin law, a court order employing court personnel is an example of judges exercising inherent power under the state constitution." (Emphasis supplied; The Petition, p. 12.) Not so. First, inherent powers in a judicial system are not those of a judge, but of a court. Second, they derive not from a constitution or from a statute, but from the nature of a court. As well put in State v. Cannon, 196 Wis. 534, 536, 221 N.W. 603 (1928), such powers, from time immemorial, "have been conceded to courts because they are courts." (Emphasis supplied.) Obviously, even if the court order in question was "an example of judges exercising inherent power under the state constitution," such example would provide no support for petitioners' effort to equate the court order in question with a civil service law, since the issuance of a court order, under constitution or statute, would do nothing to establish it as a civil service law, or other law, which it is not, no matter how issued. And as above shown, such example does not even exist.

In light of the foregoing argument it is, then, submitted that no worthwhile legal interest would be served by a decision of this Court that the assumed error above-described was committed by the Seventh Circuit, since there is no good reason to presume that Federal courts will be prone to the commission of such error.

B.

Petitioners submit, as their second reason for granting the writ sought herein that, "Certiorari should be granted to make clear that the 'explicitly mandatory

language' standard, which this Court has never approved in the property interest context, and has recently rejected in the prisoners' rights context, should not be used by federal courts to determine whether a property interest exists." The Petition, p. 16.

In pertinent part, Rule 10 of the Rules of this Court reads:

> A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> . . . .
>
> (c) . . . a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Plainly, the situation here involved shows no compelling reason, under the above-quoted rule language, for granting the writ sought herein.

As Rule 10 shows, however, it does not encompass all the "compelling reasons" which will produce a granting of the writ. Does this case present a compelling reason, other than one of those described in Rule 10, for granting the writ? It is submitted it does not. Even if the Seventh Circuit was relying upon outdated legal doctrine when it applied the "explicitly mandatory language" standard, it is submitted that the fact, shown above, that such application was innocuous rules out the existence of any truly compelling reason for granting the writ sought herein. Had the application of such standard been genuinely injurious to the petitioners, by denying to them a property right in their employment to which they were entitled, a compelling reason would arguably have existed for granting the writ. But such application did not so injure the petitioners.

From Argument II. of The Petition, pp. 16-19, it would seem that petitioners apparently believe that the writ should issue herein for what might be called warning and instructional purposes; with it apparently being petitioners' belief that an opinion issuing such writ, and remanding this case to the Seventh Circuit for reconsideration of so much of its decision as involved application of the "explicitly mandatory language" standard, would serve as a warning device and instructional tool for the lower Federal courts, trial and appellate. But the reason, if any, for issuance of the writ to serve such purposes falls far short, it is submitted, of providing a truly compelling reason for issuance of the writ.

CONCLUSION

For the reasons above shown, The Petition should be denied.

Respectfully submitted,

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